

EDO Principal Correspondence Control

FROM: DUE: 02/06/02 EDO CONTROL: G20020031
DOC DT: 12/03/01
FINAL REPLY:

Stephen A. Romano
American Ecology

TO:

Virgilio, NMSS

FOR SIGNATURE OF :

** GRN **

CRC NO:

Virgilio, NMSS

DESC:

Maywood, New Jersey FUSRAP Site

ROUTING:

Travers
Paperiello
Kane
Norry
Craig
Burns
Miller, RI
Cyr, OGC

DATE: 01/24/02

ASSIGNED TO:

CONTACT:

NMSS

Virgilio

SPECIAL INSTRUCTIONS OR REMARKS:

Add EDO and Commission on for concurrence.
Commission to review response prior to dispatch.

American Ecology Corporation
805 W. Idaho, Suite 200
Boise, ID 83702-8916

208/331-8400
Fax 208/331-7900
sromano@americaneecology.com

American Ecology

STEPHEN A ROMANO
President and
Chief Operating Officer

December 3, 2001

U.S. Nuclear Regulatory Commission
Attn: Mr. Martin Virgilio, Director
Office of Nuclear Material Safety
And Safeguards
Washington, D.C. 20655-0001

Re: 9/20/01 Letter to Jonathan Carter, Envirocare of Utah from Martin Virgilio, Director, Office of Nuclear Materials Safety and Safeguards on Maywood, New Jersey FUSRAP Project

Dear Mr. Virgilio:

American Ecology Corporation subsidiary US Ecology Idaho, Inc. is a disposal contractor to the U.S. Army Corps of Engineers ("Corps") FUSRAP program. We have reviewed your referenced September 20, 2001 letter to Envirocare of Utah and dispute the basis for the significant U.S. Nuclear Regulatory Commission ("NRC") staff policy reversal affecting the Maywood, New Jersey FUSRAP site. This reversal may place the NRC in the position of directly interfering in the competitive marketplace for no valid health and safety reason, no dispositive legal reason, and in a manner inconsistent with the intent of Congress. We ask that NRC staff again review the Maywood waste classification matter and clarify its position as requested below.

Statutory construction and the facts of the matter clearly do not compel a legal finding that the Maywood waste is 11.e (2) material. Prior to the September 20 letter, the NRC has consistently and properly concluded that it lacks authority to regulate uranium or thorium mill tailings not under license prior to the effective date of the Uranium Mill Tailings Radiation Control Act of 1978.¹ The letter's departure from this practical, bright line test by speculating on what the agency may or may not have otherwise done in the distant past at the Maywood site badly confuses this policy for no good purpose. As the record makes clear, NRC radioactive materials license STC-1333 is very precise in defining only the 19,000 cubic yards of buried tailings buried in three delineated pits as the material NRC regulates.² The NRC Safety Evaluation Report, groundwater monitoring and other relevant licensing work performed by NRC also relate specifically to the three pits only.

¹ In the Matter of Envirocare of Utah and Snake River Alliance, Office of Nuclear Materials Safety and Safeguards, USNRC, DD-00-06, p. 19, December 13, 2000.

² U.S. Nuclear Regulatory Commission Radioactive Material License number STC-1333.

The simple fact is that material outside the three Maywood pits has never been included under the NRC license at any time.³ Moreover, the 1987 NRC License Renewal Application Safety Evaluation Report explicitly contemplates that the license "shall be terminated" at the start of the "permanent disposal portion" of the project.⁴ The September 20, 2001 letter turns this plan on its head by suggesting the retroactive addition of new materials to the NRC license purely for off-site disposal purposes.

In fact, a real question exists as to whether UMTRCA applies to any of the remaining wastes at the Maywood site. UMTRCA is very clear that the U.S. Department of Energy was to fund remediation of uranium mill tailings sites not under NRC licensure. Under Title II of UMTRCA, the NRC is charged with responsibility for assuring proper disposition of licensed wastes at uranium recovery facilities. In rulemaking, NRC applied the authority to "...The tailings or wastes produced by the extraction or concentration of uranium or thorium from ore processed primarily for its source material content..."⁵ In a January 15, 1983 letter responding to an NRC Notice of Violation, Stepan Chemical Company noted that the materials outside of the pits was unknown to the company and the NRC at the time they acquired the Maywood facility.⁶ Also, the materials resulted from extraction of lanthanum, not source material.⁷ Such material would not be properly classified as 11.e (2). Rather, they are properly classified as tailings not licensed by the NRC or, depending on the concentration of thorium present, unlicensed source material.

There is no valid health or safety reason to compel disposal at an 11.e (2) disposal facility. The majority of the tailings outside the three pits have sufficiently low concentrations of constituent radionuclides that they and surrounding contaminated soils are acceptable for disposal at facilities other than NRC licensed 11.e (2) tailings impoundments. With the exception of a few areas, materials outside the pits contain considerably less than 0.05 % by weight thorium. Since the material has been in place since the 1940s or earlier, radioactive daughter products present are in equilibrium with the remaining thorium and occur at activity concentrations equal to that of their parent, thorium-232.⁸

For some time now, safe disposal of EUSRAP materials has been occurring at disposal facilities permitted under Subtitle C of the Resource Conservation and Recovery Act ("RCRA"). This is particularly appropriate where, as at Maywood, constituents regulated under the Resource Conservation and Recovery Act are also present in the waste.⁹

³ Letter to Mr. Chuck Parodi from Mr. Robert M. Bernero, Director Nuclear Materials Safety and Safeguards, NRC, dated April 26, 1994.

⁴ Safety Evaluation Report, Docket No. 40-8610, Stepan Chemical Company, November 3, 1987.

⁵ Title 10 Code of Federal Regulations, Part 20, Section 1003, Definition 2 for by-product material.

⁶ Letter to Thomas T. Martin, Director Division of Engineering and Technical Programs, USNRC, signed by Richard L. Jacobson, Atty. For Stepan Chemical Co. dated January 15, 1983.

⁷ Ibid.

⁸ Telephone conversation between David Hayes, USACE, and Charles R. Meyer, US Ecology, Inc., October 29, 2001.

⁹ Letter to Ms. Myr Campbell, USNRC, from Mr. Francis T. Bretznick, Laboratory Director, USEPA, Region II, dated July 22, 1981.

Hence, there is a history of safe alternative disposal methodology for FUSRAP materials.¹⁰ By utilizing these properly regulated facilities, the Corps has met the intent of Congress to provide cost effective disposal for pre-UMTRCA FUSRAP materials while considering... "all feasible options that achieve protectiveness and compliance with all applicable federal and state laws."¹¹

Through its September 20, 2001 letter, the NRC staff has seemingly stepped into the shoes of the Corps, thereby frustrating the Corps' ability to cost-effectively administer the FUSRAP program at the Maywood site. This is inconsistent with the intent of Congress and the Memorandum of Understanding recently entered into between the two agencies. Through its action, the NRC may also inadvertently prevent our company and others from competing to serve the FUSRAP program at the Maywood site. Having bid the Maywood project on four separate occasions at considerable expense, NRC staff's eleventh hour waste reclassification opinion is very troubling. You should also know that your letter has been employed in attempts to influence disposal Corps decisions for remediation of the Shattuck Chemical radium site in Denver, and will undoubtedly be cited in relation to other Corps of Engineers business opportunities.

Conclusion:

We do not dispute the NRC finding that FUSRAP materials at the Maywood site may go to a licensed 11.e (2) disposal facility such as the Envirocare of Utah facility. There is, however, no valid legal or health and safety reason for an NRC staff finding seeking to compel disposal of all non-pit Maywood site waste at an 11.e (2) disposal facility, thus disqualifying our company and other Corps contractors from participating in the largest FUSRAP project to date (estimated 400,000 tons). At a minimum, NRC staff should promptly clarify that the final decision on selection of a cost-effective disposal option consistent with protection of public health and safety and the environment is the responsibility of the U.S. Army Corps of Engineers. NRC staff should also clarify (consistent with the recent Memorandum of Understanding entered into with the Corps) that the referenced NRC staff correspondence on the Maywood waste classification matter are non-binding on the Corps and advisory in nature, and that no law or regulation compels disposal of all removed non-pit Maywood site material at a licensed 11.e (2) facility.

We look forward to your timely response to this request. In the meantime, please contact me at (208) 331-8400 if you or your staff have any questions.

Sincerely,



Stephen A. Romano
President and Chief Operating Officer

¹⁰ "In the Matter of Envirocare of Utah and Snake River Alliance", Office of Nuclear Materials Safety and Safeguards, USNRC, DD-00-06, p. 22, December 13, 2000. And DOE/BC/W-31-109-ENG-38-8, An Assessment of Disposal of Petroleum Industry Non-hazardous Landfills, Argonne National Laboratory, p. 3, October, 1999.

¹¹ "Off-Site Disposal of Materials from the Formerly Utilized Sites Remedial Action Program", p. 2, US Department of the Army, U. S. Army Corps of Engineers, Engineer Circular 200-1-3, January 3, 2000.

cc: Richard Meserve, Chairman, and Members, U.S. Nuclear Regulatory Commission
Michael Weber, NRC
Tim Curtin, US Ecology Idaho, Inc.
C. Russ Meyer, Radiation Safety Officer, US Ecology Idaho, Inc.
Robert Trimble, General Counsel, American Ecology Corporation
Tom Urbaniak, FUSRAP Program Manager, USACE, Kansas City
Jean Jennings, Contract Administrator, USACE, Kansas City
Ann Wright, Counsel, USACE, Omaha